

**Testimony Before the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution**

**By
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**On
The Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose
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Mr. Chairman and Members of the Subcommittee: Thank you for your important work conducting extensive hearings on the Voting Rights Act. I am honored to be invited to testify today. I bring two perspectives on the operation and practical implementation of Section 5 of the Voting Rights Act. The first comes from over 15 years' experience representing a variety of individual and organizational plaintiffs in Voting Rights Act litigation as an attorney in private practice and as the former Director of the Voting Rights Project for the Lawyers' Committee for Civil Rights Under Law. The second, inside perspective, comes from my role as the Deputy Assistant Attorney General in the Civil Rights Division of the Department of Justice with responsibility for the Voting Rights Section, among others, from April 1998 to August, 2000.¹ Both perspectives provide important evidence that the original purpose of Section 5 has not yet been fully served.

From representing minority voters in jurisdictions covered by the Voting Rights Act one overwhelming truth is apparent. The lingering effects of past intentional racial discrimination continue to disadvantage minority voters as they attempt to be heard at every step of the democratic process. From registering to vote and running as a candidate, to casting a ballot and influencing policy outcomes, minorities continue to face more hurdles than whites. These hurdles include:

- the continued prevalence of racially polarized voting,
- redistricting plans that crack and pack minority voters to dilute their voting strength,
- numerous efforts at the local level to dismantle single-member districting plans even though they were created as the result of successful Section 2 litigation, and to return to at-large election systems,
- manipulation of town boundaries through annexations that exclude black voters as small towns grow,
- moving polling places to locations less accessible to minority voters,
- poorly trained polling place workers whose personal biases lead them to make different demands on minority voters, to offer minority voters less assistance or to deny them a ballot without justification,

¹ In both of these prior roles my name was Anita Hodgkiss. I have since changed my last name to Earls due to a change in marital status.

- the imposition of new registration and voting practices that make it more difficult for minority voters to register and cast a ballot,
- education and income disparities that make it more difficult to mount effective political campaigns, and
- less access to the internet and other tools of political organization.

There is extensive documentation of each of these practices and problems that will be made a part of the record during the course of these hearings. For now, let me give you one example of the documented way in which apparently neutral practices present particular obstacles for minority voters because those voters continue to experience the lingering effects of past official and intentional racial discrimination in voting, education, housing, employment and public accommodations.

In 1998 the State of Florida passed a law changing absentee balloting requirements in order to guard against election fraud. The new law required voters to complete a certificate indicating the reason why they were voting absentee, the last four digits of their social security number, the signature of a witness who is a registered voter in the State of Florida, the signing of an oath promising that the witness has not witnessed more than five absentee ballots, the voter identification number of the witness and the county where the witness is registered. Several counties began implementing the changes before they had been precleared. This generated data that is usually not available during the Section 5 review process, namely concrete evidence of how the practice was affecting black voters. What the Justice Department found was that “where the covered counties sent absentee ballots to voters with the new state law requirements printed on the absentee voter certificate, the votes of minority voters would have been more likely than white voters to be considered “illegal” and thus not counted. Minority voters were more likely to fail to meet one of the State’s new requirements than were white voters.”² For example, in Hillsborough County, home of Tampa, twice as many black absentee voters as white absentee voters failed to meet one of the new requirements. The Department of Justice concluded that this was discriminatory and blocked implementation of the new requirements. Fortunately, Section 5 was available to prevent these changes because they would have made it disproportionately more difficult for black voters to cast a ballot.

In general, as the American Political Science Association’s Task Force on Inequality and American Democracy recently concluded:

As the relative economic conditions for many in the ranks of America’s minorities have stagnated or declined, improvements in minority participation and political influence have also stalled. The political playing field remains highly unequal, and the immediate gains of the rights revolution have not yielded sustained equalization of political voice. Four decades after the crowning legislative achievements of the rights revolution, racial and gender inequalities continue to hamper educational attainment, employment prospects, income, and other factors

² Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to the Honorable Robert A. Butterworth, Attorney General of the State of Florida (August 14, 1998) (copy available at: http://www.usdoj.gov/crt/voting/sec_5/ltr/l_081498.htm).

critical to the distribution of the skills and resources that generate political participation.³

As long as we do not have a level playing field; minority voters do not have an equal opportunity to participate in the political process. The original purpose of Section 5, to prevent the use of voting practices that have a discriminatory purpose or effect, remains salient today.

It has been said that Section 5 is no longer needed because black voter registration rates have increased and we no longer see the widespread brutal intimidation of blacks who try to register to vote, the use of poll taxes and sham literacy tests to reject black applicants, and other overtly racist practices that characterized covered jurisdictions when Section 5 was originally enacted. But in fact, the purpose of Section 5 was not solely to combat those evils – other portions of the Act, including those prescribing criminal penalties for intimidating voters and Sections 2 & 4 of the Act were designed to prevent those abuses. Section 5 had a very specific and different purpose: namely to “remedy [a] century of obstruction by shifting ‘the advantage of time and inertia from the perpetrators of the evil to its victims.’”⁴ In short, Section 5 was needed to prevent jurisdictions from introducing new procedures and techniques that had the purpose or effect of discriminating against minority voters. As recent experience illustrates, that danger still exists.

When the Voting Rights Act was initially passed, Congress was frustrated by a pattern of litigation followed by local authorities implementing new procedures with the same ultimate discriminatory result. As the Supreme Court noted in *South Carolina v. Katzenbach*, “[e]ven when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees.”⁵ Today we are seeing at the local level a similar process occurring, as jurisdictions seek to implement at-large election methods that are modified only slightly from methods that previously were found to be illegal. In Texas, North Carolina, Alabama and elsewhere, jurisdictions that were sued in the 1980’s and 1990’s under Section 2 of the Voting Rights Act, found to be in violation of the Act, and ordered to implement single-member districts are now trying to return to at-large election systems.⁶

Section 5’s non-retrogression principle is an important bar to such changes. For example, in August, 2002 the Department interposed an objection to the City of Freeport, Texas’ plans to use an at-large election method with numbered posts.⁷ Previously the City had been sued by Hispanic voters challenging the City’s at-large election method and, in 1992, the City settled the

³ Task Force on Inequality and American Democracy, American Political Science Association, *American Democracy in an Age of Rising Inequality* (2004) (available at: http://www.apsanet.org/section_256.cfm).

⁴ *City of Rome v. United States*, 446 U.S. 156, 182 (1980), (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

⁵ 383 U.S. 301, 314 (1966).

⁶ See Letter from J. Michael Wiggins, Acting Assistant Attorney General to Wallace Shaw, Esquire (August 13, 2002) (available at http://www.usdoj.gov/crt/voting/sec_5/ltr/1_081202.htm); *NAACP v. City of Thomasville*, No. 4:86-cv-00291 (M.D.N.C., filed March 31, 1986); Letter from Michael Crowell to Mr. Sammy Hinson, Concerned Citizens of Columbus County, (October 6, 2005); *Ward v. Columbus County*, 782 F.Supp. 1097 (E.D.N.C. 1991); *Montgomery County Branch of the NAACP v. Montgomery County*, No. C-90-27-R, (M.D.N.C. Order dated July 3, 2003); *Dillard v. Chilton County Commission*, No. 2:87-1179-T (M.D. Ala, filed August 11, 1987).

⁷ Letter from J. Michael Wiggins, Acting Assistant Attorney General to Wallace Shaw, Esquire (August 13, 2002) (available at http://www.usdoj.gov/crt/voting/sec_5/ltr/1_081202.htm);

litigation by adopting a single-member district system that allowed minority voters to elect their candidates of choice in two districts. Section 5 prevented the City from reverting to the discriminatory system. Without Section 5, minority voters have no option but to go back to court to defend the decrees they obtained just a few years' earlier. This is the backsliding that Section 5 is designed to prevent. The gains made since the Act's reauthorization in 1982 are too fragile to be abandoned at this stage. The threat of their being circumvented and overturned is very real.

In considering the practical realities of how Section 5 operates, there are several important points to consider. First, the career attorneys in the Department who are responsible for working closely with election administration officials in the covered jurisdictions year in and year out generally develop a high level of knowledge about a jurisdiction's laws, procedures, and past experiences. Voting section attorneys understand the realities of trying to administer elections because they all go on observer coverage and witness firsthand what it means to try to set up hundreds of polling places all coordinated to function according to a detailed set of procedures on a single day interacting with thousands of members of the public. Section staff generally have collegial relationships with state and local officials and an appropriate deference to local autonomy. They often provide technical assistance to state and local officials who are trying to figure out the best way to comply with Section 5. Jurisdictions will make changes in election administration procedures after consulting with Voting Section attorneys because they want to be able to ensure that they will not be disadvantaging minority voters.

It is not surprising, then, that the Counsel to the North Carolina State Board of Elections recently commented in the course of a presentation on the practical aspects of Section 5 preclearance that the costs were not significant except as to redistricting submissions, that the main commitment is to promptly submit and take the time to do it correctly and that the entire process is usually handled by on-staff governmental attorneys. From his perspective, the benefits of Section 5 review included that it:

- Adds a layer of protection for governmental units as to allegations of discrimination or adverse racial effect
- Prevents actions that would have discriminatory impact from going into effect as opposed to litigation to undo, and
- Forces election preparation of special elections well in advance, protects affected elections from last minute changes.

The same presentation featured the following samples of recent comments from local election directors in North Carolina about their experiences with Section 5 review, demonstrating that many welcome the process, while a few are less than thrilled with it.

- "I would hate to operate without it"
- Preclearance requirements are "routine...do not occupy exorbitant amount of time, energy, or resources"
- "I can always fall back on Section 5" as to my actions
- "60 day approval does cause holdups in certain areas"
- "Allows us an opportunity to assure the public that minority rights are being protected...and that someone is independently validating those decisions"

- “Racism still exists, but not to the extent that we need to mandate preclearance of changes”
- “The history of _____ County causes our operations to be scrutinized and rightfully so. The first black to serve on the board of elections was 1991”

The Section 5 review process is efficient, flexible, makes use of recent electronic media to facilitate information sharing, and is designed to be as easy as possible for the local jurisdictions while still giving the Department the opportunity to gather relevant information and make an informed judgment. It is a valuable resource.

Second, the Section 5 review process is weighted in favor of jurisdictions in one significant way. If the Department of Justice interposes an objection to a change affecting voting, the jurisdiction has the right to “appeal” that determination by bringing a declaratory judgment action in the D.C. District Court. On the other hand, if the Department grants preclearance, there is no appeal for voters who opposed the change and wanted the Department to issue an objection. This means that close calls often go in the jurisdiction’s favor, even though the burden of proof is on the jurisdiction to demonstrate that the change does not have a discriminatory purpose or effect. The specter of an embarrassing appeal to the D.C. District court generally deters DOJ officials from issuing objections that are anything less than completely supported by the facts in the record. There may be one or two exceptions to this general rule, but those exceptions do not demonstrate that the process overall is subject to abuse.

Third, redistrictings are only a portion of what the Department reviews. It is very important to remember that annexations, polling places changes, absentee balloting procedures, special elections and the adoption of various other election rules and procedures are also subject the review and make up an important part of the Section 5 work. In many ways, the greatest impact of Section 5 is seen in local communities and particularly in rural areas, where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like. Voters in these communities do not have access to the means to bring litigation under Section 2 of the Act, yet they are often the most vulnerable to discriminatory practices, such as racially disparate annexation practices, that have significant impact on their property values, standing of living and their ability to participate equally in the election process.

Fourth, the Section 5 review process often has a deterrent effect without the Department of Justice having to become involved at all. For example, in the mid-1990’s a traditionally African-American community in North Carolina called “Battleboro” was eager to be a part of the economic growth occurring around the city of Rocky Mount. Predominantly white neighborhoods to the west of Battleboro were being annexed by the City, but the City’s leaders refused to annex Battleboro. Annexation would bring municipal services to the residents of Battleboro as well as give them a vote in local elections. Knowing that their taxes would also increase, the residents were still convinced that their future as a community depended on being a part of the City. They did not want to be left behind while areas around them experienced economic growth and the benefits of being part of the municipality.

At the time, Rocky Mount was a majority-white city, although the differential rates of population growth were apparent. City planners projected that by the 2000 Census, Rocky

Mount would be a majority-black city. Annexing Battleboro would only increase this trend. But the city was also annexing white residential areas at the time. Rocky Mount straddles Edgecombe and Nash Counties, both of which are covered jurisdictions under Section 5 of the Voting Rights Act, hence, any changes affecting voting in the City of Rocky Mount must be submitted for preclearance.

Residents of Battleboro organized and lobbied the Mayor and City Council members to annex them. One of the key factors that led the city to agree to annex this community was the fact that community members were prepared to vigorously protest any future annexations of white neighborhoods in the Section 5 preclearance process. The City would face fierce opposition to other development plans if they refused to incorporate the black community. Sustained community pressure, with legal representation, ultimately led the City to back down and agree to annex Battleboro. Today the residents enjoy municipal services, the right to vote in city elections, rising property values and a higher standard of living because of their incorporation into the City of Rocky Mount. As of the 2000 Census, Rocky Mount's population was 56% African-American.

Knowing that any changes affecting voting will receive Justice Department scrutiny, state lawmakers and to a lesser extent, local decision-makers in the covered counties are generally more careful to avoid the most blatant forms of discrimination. In addition, the retrogression standard and preclearance requirement can be a bargaining chip that minority voters can use to assert their right to equal treatment.

The rationale for reauthorizing Section 5 of the Voting Rights Act is simple. Its history demonstrates it works, but current conditions demonstrate that its purpose has not yet been fulfilled. Thank you very much for your commitment to the democratic principles that the Act seeks to make real for all Americans.